

808 KAR 10:380. Solicitations of interest prior to the filing of a registration statement.

RELATES TO: KRS 292.330, 292.340, 292.410(1)(i), (q), 292.470

STATUTORY AUTHORITY: KRS 292.500(3)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 292.500(3) authorizes the commissioner to promulgate administrative regulations necessary to carry out the provisions of KRS Chapter 292. KRS 292.330 requires registration for a nonexempt security. KRS 292.410(1)(q) authorizes the commissioner to create exemptions from the registration requirements established in KRS 292.330. This administrative regulation establishes requirements for determining if a solicitation of interest prior to the filing of a registration statement requires registration pursuant to KRS 292.330.

Section 1. (1) Pursuant to KRS 292.410(1)(q), a written document, oral communication, Internet communication, or the dissemination of a scripted radio or television broadcast, made by or on behalf of an issuer for the sole purpose of soliciting an indication of interest in receiving an offering circular (or its equivalent) for an offering of a security in this state shall be exempt from the requirements established in KRS 292.330 to 292.390 if:

(a) The issuer:

1. Is or will be a business entity organized under the laws of one (1) of the states or possessions of the United States or one (1) of the provinces or territories of Canada;
2. Is engaged in or proposes to engage in a business other than petroleum or natural gas exploration or production or mining or other extractive industries; and
3. Is not a development stage company that either has:

a. No specific business plan or purpose; or

b. Indicated that its business plan is to merge with an unidentified company or companies;

(b) The solicitation of interest is not for a blind pool offering or other offering for which the specific business in which to be engaged or property to be acquired cannot be described at the time of the solicitation;

(c) The issuer intends to register the securities in this state and conduct its offering pursuant to 15 U.S.C. 77c(a)(11), 17 CFR 230.147, 230.251, or 230.504;

(d) The written document, Internet communication, or script of the broadcast:

1. States that the solicitation is not an offering of a security for sale, and that a public offering to be made shall be made by means of an offering circular that:

a. May be obtained from the issuer; and

b. Will contain detailed information about the company and management, as well as financial statements;

2. States that no money or other consideration is being solicited, and if sent in response, shall not be accepted;

3. States that a sale of a security shall not be made or a commitment to purchase shall not be accepted until:

a. A registration statement is filed with the commissioner and becomes effective; or

b. An appropriate exemption from registration is available and utilized;

4. States that an indication of interest made by a prospective investor shall not involve an obligation or commitment; and

5. Identifies the chief executive officer of the issuer and briefly and in general describes its business and products;

(e) Five (5) business days prior to the initial solicitation of interest under this administrative regulation, the issuer submits a copy of a written document, a written transcript of the Internet communication, or the script of a broadcast to be used in reliance upon this section to the

commissioner. The document, transcript, or broadcast script shall contain or be accompanied by the name and telephone number of a person able to answer questions about the document or the broadcast. The issuer shall also submit solicitation of interest material that contains substantive changes from or additions to previously submitted material;

(f) An oral communication with a prospective investor or other broadcast shall not be made until after submission of the written document or script of the broadcast to the commissioner as required by paragraph (e) of this subsection;

(g) A written document, script, advertisement or other material which the issuer has been notified by the commissioner not to distribute shall not be used to solicit an indication of interest;

(h) Except for a scripted broadcast and except to the extent necessary to obtain information needed to provide a solicitation of interest document, the issuer shall not communicate with a prospective investor about the contemplated offering unless the prospective investor is provided with a written document containing the disclosures required by paragraph (d) of this subsection at or before the time of the communication or within five (5) calendar days after the communication;

(i) During the solicitation of interest period, the issuer shall not solicit or accept money or other consideration, or a commitment, binding or otherwise, to purchase a security from a prospective investor in reliance upon this section;

(j) A sale shall not be made until a registration statement is effective pursuant to KRS Chapter 292 with respect to the offering, or an appropriate exemption from registration is available and utilized; and

(k)1. Except as provided in subparagraph 2 of this paragraph, the issuer does not know, and in the exercise of reasonable care could not know, that the issuer, any of the issuer's officers, directors, general partners or beneficial owners of ten (10) percent or more of any class of its equity securities, any promoter presently connected with the issuer in any capacity, or any person paid or given, directly or indirectly, a commission, fee or other remuneration for soliciting an indication of interest pursuant to this administrative regulation:

a. Has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to a federal or state securities law within five (5) years prior to the submission of the written document or broadcast script to the commissioner as required by paragraph (e) of this subsection;

b. Has been convicted within five (5) years prior to the submission of the written document or broadcast script to the commissioner as required by paragraph (e) of this subsection of a felony or misdemeanor in connection with the offer, purchase or sale of a security or a felony involving fraud or deceit, including forgery, embezzlement, obtaining money under false pretense, larceny or conspiracy to defraud;

c. Is currently subject to a federal or state administrative enforcement order or judgment entered by a state securities administrator or the Securities and Exchange Commission within five (5) years prior to the submission of the written document or broadcast script to the commissioner as required by paragraph (e) of this subsection, or is subject to a federal or state administrative enforcement order or judgment entered within five (5) years prior to the submission of the written document or broadcast script to the commissioner as required by paragraph (e) of this subsection, in which fraud or deceit, including making an untrue statement of material fact or omitting to state a material fact, was found;

d. Is subject to a federal or state administrative enforcement order or judgment which prohibits, denies or revokes the use of an exemption from registration in connection with the offer, purchase or sale of a security; or

e. Is currently subject to an order, judgment or decree of a court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to an order, judgment or decree

of a court of competent jurisdiction permanently restraining or enjoining, the party from engaging in or continuing a conduct or practice in connection with the purchase or sale of a security or involving the making of a false filing with the state entered within five (5) years prior to the submission of the written document or broadcast script to the commissioner as required by paragraph (e) of this subsection.

2. The prohibitions established in subparagraph 1 of this paragraph shall not apply if:

a. The person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against the person;

b. The broker-dealer employing the party is licensed or registered in Kentucky and the Form BD filed with Kentucky discloses the order, conviction, judgment or decree relating to the person.

3. A person disqualified under subparagraph 1 of this paragraph shall not act in a capacity other than that for which the person is licensed or registered.

4. A disqualification pursuant to subparagraph 1 of this paragraph shall be automatically waived if the agency which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

5. It shall be a defense to a violation of subparagraph 1 of this paragraph if the issuer sustains the burden of proof that it did not know, and in the exercise of reasonable care could not have known, that a disqualification under subparagraph 1 of this paragraph existed.

(2)(a) A communication with a prospective investor shall not be made in reliance on this administrative regulation after a registration statement is filed in this state.

(b) A sale shall not be made pursuant to an effective registration statement until at least twenty (20) calendar days after the last communication made in reliance on this administrative regulation.

(3)(a) Except as provided in paragraph (b) of this subsection, a failure to comply with a condition established in subsection (1) of this section shall not result in the loss of the exemption from the requirements of KRS 292.340 through 292.390 for an offer to a particular individual or entity if the issuer shows:

1. The failure to comply did not pertain to a condition directly intended to protect that particular individual or entity;

2. The failure to comply was insignificant with respect to the offering as a whole; and

3. A good faith and reasonable attempt was made to comply with all applicable conditions of subsection (1) of this section.

(b) If an exemption is established only through reliance upon the provisions of paragraph (a) of this subsection, the failure to comply shall:

1. Be actionable as a violation of KRS Chapter 292 by the commissioner under KRS 292.470; and

2. Constitute grounds for denying or revoking the exemption as to a specific security or transaction.

(4) A written document or Internet communication used in reliance upon this administrative regulation may include a coupon returnable to the issuer or an Internet email link to the issuer, which shall:

(a) Indicate interest in a potential offering;

(b) Reveal the name, address and telephone number of the prospective investor;

(c) State clearly and separately that:

1. The indication of interest shall not be binding; and

2. Money shall not be sent; and

(d) Not request information about the financial profile of the investor, including income, assets or investment history.

(5)(a) The commissioner shall waive a condition of this exemption in writing, upon application by the issuer if the issuer shows good cause for the exemption.

(b) The compliance or attempted compliance with the requirements of this administrative regulation, or the absence of an objection or order by the commissioner with respect to an offer of a security undertaken pursuant to this administrative regulation, shall not be deemed to be a:

1. Waiver of a condition of this administrative regulation; or

2. Confirmation by the commissioner of the availability of the exemption authorized by this administrative regulation.

(6) An offer made in reliance on this administrative regulation shall not result in a violation of KRS 292.340 by virtue of being integrated with a subsequent offer or sale of a security unless the subsequent offer or sale would be integrated under an applicable federal security law.

(7) If an issuer has a bona fide change of intention and decides to pursue an exempt offering pursuant to KRS 292.410(1)(i) or 808 KAR 10:210 after following the process established by this administrative regulation without having filed a registration statement, the issuer may proceed with the exempt offering if:

(a) At least thirty (30) calendar days have elapsed between the last solicitation of interest pursuant to this administrative regulation and the first sale of a security pursuant to the exempt offering; and

(b) The issuer has complied with all of the conditions of the applicable exemption, including the provision of all solicitation of interest documents submitted to the commissioner.

(8) A communication made in reliance on this administrative regulation shall be subject to the antifraud provisions of KRS Chapter 292.

(9) A commission, fee or other remuneration shall not be paid or given, directly or indirectly, to a person for soliciting a prospective investor in this state unless the person is:

(a) Appropriately registered in this state pursuant to KRS 292.330; or

(b) Exempt from registration.

Section 2. If an indication of interest is solicited in reliance upon this administrative regulation by an agent of the issuer, the person shall be exempt from the agent registration requirements of KRS 292.330 if all of the conditions established in Section 1(1) of this administrative regulation are satisfied.

Section 3. Incorporation by Reference. (1) Form B-D, "Application for Registration as Broker-Dealer", July 1988 edition, is incorporated by reference.

(2) It may be inspected, copied, or obtained at the Department of Financial Institutions, 1025 Capital Center Drive, Suite 200, Frankfort, Kentucky, 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(3) A copy may also be obtained from the National Association of Securities Dealers (NASD), 1735 K Street, N.W., Washington, D.C., 20006, or a regional NASD office. (24 Ky.R. 2271; Am. 25 Ky.R. 99; eff. 6-25-98; TAm eff. 11-7-2012.)